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IN THE

Supreme Court of the United States

October Term, 1963

No. 703

SKOKOMISH TRIBE OF INDIANS,
Petitioner,

v.

E. L. FRANCE, ET AL.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SKOKOMISH TRIBE OF INDIANS,
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E. L. FRANCE, ET AL.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Skokomish Tribe of Indians, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on July 27, 1963.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is reported *sub nom* in *Skokomish Tribe of Indians v. E. L. France, Trustee*, 226 Fed. Supp. 840 (1958). The opinion of the Court of Appeals, printed as Appendix A hereto, *infra*, p. 31, is reported in 320 F.(2d) .....

JURISDICTION

The judgment of the Court of Appeals was entered on July 27, 1963 and is printed in Appendix A. On October 24, 1963, the Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit, extended the time

within which to apply for a writ of certiorari from October 29, 1963 to December 24, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

The jurisdiction of the District Court under 28 U.S.C. 1331 and 1345 was sustained by the Court of Appeals on the first appeal in an opinion filed June 26, 1959 from cause No. 16008. The Court of Appeals had jurisdiction of this appeal under 28 U.S.C. Sec. 1291 and 1294.

QUESTIONS PRESENTED

1. Where the Skokomish Tribe of Indians reserved for themselves a reservation at the head of Hood's Canal under the Treaty of Point No Point of January 26, 1855 (printed as Appendix B) and the said reservation was further implemented by an executive order dated February 25, 1874. Did this reservation by these "fish-eating" Indians out of their aboriginal habitat evidence an intention to constitute a reservation tot hem of the appurtenant and adjacent tidelands abutting on the boundaries of the reservation so described in the treaty and in the executive order? (Where they obtained 29 species of fish from these tidelands—Appendix E.)

2. That the construction of the treaty and the Executive Order in the instant case conflict with the prior opinions of the Supreme Court of the United States and the Ninth Circuit Court of Appeals in the following cases, to-wit: (See table cases overruled by this opinion, Appendix D.)

James v. Nicholson, 9 Howe 356, or 50 U.S. 356, at page 364; 13 Law Ed. 172; also

United States v. Wynans, 198 U.S. 371, 25 Sup. Ct. 662, 49 Law Ed. 1089, also *Santa Fe Pacific R. R. Co.*, 214 U.S. 339, 86 Law Ed. 250, also *United States v. Moore*, 62 Fed. Sup. 660, and *Moore v. United States*, 157 F.(2d) 716.

STATUTES INVOLVED

The Treaty of Point No Point between the United States of America and the Skokomish Tribe of Indians was entered into on January 26, 1855 and is found in 10 Stat. page 12 Stats. 933 and the executive order of February 24, 1874, Appendix C, signed by President U. S. Grant, and Washington Enabling Act, 25 Stats. Chapt. 180, 676.

STATEMENT OF THE CASE

The Skokomish tribe of Indians reserved for themselves a reservation at the head of Hood's Canal, a tidal basin connected with Puget Sound in Western Washington, which reservation was a portion of over a million acres ceded to the United States under the Treaty of Point No Point. The salt water fishery is the great resource of the Northwest Coast Indians and is comparable to the buffalo on the great plains for the Indians of the midwest. Nineteen years after the treaty was entered into, President U. S. Grant issued an executive order creating the reservation set out in the treaty for the Skokomish tribe. In 1889, the State of Washington entered the Union, and when the shellfish beds on Hood's Canal became important between 1900 and 1950, the State of Washington and its vendees appropriated the tidelands abutting on and adjacent to the Skokomish reservation at the head of Hood's Canal in

Western Washington. Although the United States entered into the treaty with the Skokomish, it has failed and refused to preserve the tidelands for the tribe. The Skokomish tribe brought a suit against all persons in title to these tidelands, including the respondents in the within case and the District Court ruled against the tribe, quieting title in the respondents and the Court of Appeals affirmed this decision as set out in Appendix "A" herein. There are thirty-three tribes of Indians in Western Washington covered by treaties with the United States and a majority of them have similar provisions reserving fishing rights and shellfish beds to the Indians and these treaties have uniformly and without exception been construed to include as a portion of the fishing right all tidal waters on shore lands abutting on reservations. The Court of Appeals has, by its decision, created a real and serious conflict with a long line of cases of this court and other decisions within this circuit concerning the ownership of shore lands and tidelands abutting reservations.

REASONS FOR GRANTING THE WRIT

Reason No. 1

The decision of the Court of Appeals in the instant case is in conflict with prior decisions of this court.

The first issue before the court below concerns the intention of the Indians and the United States when they held the treaty conference in 1855 between three thousand Indians and Governor Stevens representing the United States. The table set out in Appendix "D" graphically illustrates the precedent established by judicial decision

and practice over the past one hundred years concerning the intention of the Indians of the United States with reference to the inclusion of tidelands within the boundaries of Indian reservations in the Puget Sound area where 90 per cent of the subsistence of the Indians came from the salt water. A cursory examination of all of the treaties of the thirty-three tribes in this area will clearly indicate that the salt water and its shore lands and tidelands were the major source of the aboriginal livelihood. This decision, if allowed to stand, will cloud the titles and leave unresolved the question of ownership of tidelands by all of the tribes having any shore lands abutting on the reservations. This case will place this valuable aspect of aboriginal rights and subsistence in dispute and it must so remain until settled by the Supreme Court. Clearly, the question presented is extremely important to the Indian tribes of the Northwest coast and Alaska and settlement of this question is in the public interest and of great importance to the few remaining original Americans. This question, in its unsettled condition, will arise in all of the treaties in the State of Washington and will afford opportunities to question the title of the various tribes to tidelands which they have never relinquished since time immemorial.

Reason No. 2

The decision of the court below is clearly erroneous and is in conflict with the prior decisions of the Ninth Circuit Court of Appeals, as graphically illustrated in Appendix "D" and the attempt to distinguish the prior decision of the Ninth Circuit is patently abortive.

Reason No. 3

The decision of the court below is erroneous with reference to the rules of construction applied to the Treaty of Point No Point and the Executive Order of U. S. Grant in 1874. The rules of construction embraced by the Court of Appeals conflicts with the applicable decision of this court. There have been numerous cases as hereinafter set out which began with the birth of the Union and John Marshall. The instant case impliedly and inferentially overrules and changes these rules of construction. The court below has judicially legislated that, if a necessary and imperative adjunct to the aboriginal subsistence is not precisely described by metes and bounds, it is not a part of the reserve and all doubt must be resolved in favor of the State and against the Indian.

Reason No. 4

The Circuit Court opinion is in conflict with the four corners of Point No Point.

Another reason that certiorari should be granted is that the Circuit Court has erroneously applied the rules of treaty construction and has completely ignored prior cases determined by the United States Supreme Court concerning the rules of treaty construction and has completely ignored various provisions of the treaty, that is, to-wit: Article II, Article IV and the first sentence in Article IX. The trial court's opinion is totally erroneous because it is based on one phrase of the treaty, "along Hood's Canal," while other portions of the treaty as a whole express the Indian's intent. (See Appendix "B")

1. That a clause of Article II of the Treaty provides:

". . . and so far as necessary surveyed and marked out for their exclusive use . . .

and this clause denotes a reserve where the Indians could pursue their aboriginal use of tidelands as well as other sources of food for their sustenance which was 90 per cent fish with 29 species as set out in Appendix "E." What is the difference between this clause and the phrase, *"a tract of land sufficient for their wants"*? Looking at the four corners of the treaty, the instant case should follow *U. S. v. Moore*, 157 F.(2d) 760. The two treaties and executive order apply to tribes about thirty air miles apart in these two cases, and should be construed alike.

2. Article IV of the Treaty of Point No Point provides:

". . . *the right of taking fish at all usual and accustomed grounds and stations is further secured to said Indians* . . ."

and it further provides:

. . . *"that they shall not take shellfish from any bed staked or cultivated by citizens."* (Emphasis supplied)

This article to the treaty would be meaningless unless the Skokomish had reserved their tidelands as the gateway to the tidal basin of Hood's Canal and salt water containing 29 species of fish and shellfish as well as a water highway for their canoes. They utilized Hood's Canal for fish and shellfish as described by Myron Eells, who observed their fishing economy and described it in the 1850s and '60s in Appendix "E" herein.

The Twana or Skokomish Indians and the treaty negotiators were so concerned about the shellfish that they made a special clause or provision in the treaty for the

preservation of that right, which could only be exercised or have meaning if the Skokomish or Twana retained their tidelands. These tidelands extend from and are adjacent to and appurtenant to the reservation and cover approximately two miles of bottom or basin of Hood's Canal at the mouth of the Skokomish River and are an integral part of the reservation which they never intended to give up under the treaty set out in Appendix "B."

The Indians were a sovereign nation, but an ignorant, dependent and helpless people, as is indicated by the first sentence in Article IX of the Treaty of Point No Point, found in Appendix "B" herein as follows:

> "The said tribes and bands acknowledge their dependence on the United States, and promised to be friendly with all citizens thereof . . ."

That this treaty was entered into by Governor Stevens for the United States and 3,000 Indians who were unable to speak the language and had no knowledge of any of the contents of the treaty other than they had promised that they would have reserved unto themselves all of their means of eking out their aboriginal subsistence from the land. It is apparent that the Skokomish, like some 33 other tribes on the Puget Sound tidal basin, lived on a tidal basin known as Hood's Canal. They intended that they should continue to live in their aboriginal economy by fishing, which comprised 90 per cent of their diet.

ARGUMENT

This case involves the construction of the Treaty of 1855 entered into between the Skokomish Indian Tribe and creating the Skokomish Indian Reservation (12 U.S.

Stat. at large 933; ratified and proclaimed 1859). The treaty set aside as the exclusive habitat of the Skokomish Indians lands at the head of Hood's Canal which was thereafter to be set apart by an executive order and, as the treaty states (see Appendix B):

> ". . . and so far as necessary surveyed and marked out for their exclusive use; * * *"

At the outset we would like to point out that the Circuit Court of Appeals, while underscoring this language, overlooked its purport in that it indicates that so much of the land as was necessary for the livelihood of this tribe was to be exclusively theirs. Thereafter an executive order signed by President Grant set forth the boundaries of the Skokomish Indian Reservation and the last phrase of the executive order is the matter here in issue. It states, after with some particularity following section lines from a point on Hood's Canal.

> "Thence east to Hood's Canal; thence southerly and easterly along said Hood's Canal to the place of beginning."

It is possible to draw the line from the place where the north boundary of the reservation meets Hood's Canal southerly to the place of beginning in a variety of ways. The real question is whether this line should be drawn in such a way as to include the tidelands which abut that which is conceded to be in the reservation, or whether they should be excluded.

It is best to commence a consideration of this problem by endeavoring to place oneself in the position of the contracting parties over one hundred years ago. This

understanding is reflected by the Enabling Act which enabled the Territories of North and South Dakota, Montana and Washington to becomes states. This Enabling Act is found in 25 U.S. Stat. at large, Ch. 180, p 676, and was approved February 22, 1889. It reads in part as follows:

> "Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that, until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States; and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . ."

This Enabling Act is reflected in almost verbatim language in the Washington State Constitution, Article XXVI, which was ratified by the people of the state on October 1, 1889. The Enabling Act was discussed in *Vermillion v. Spotted Elk*, 85 N.W. (2d) 432 (N.D.) (1957).

We submit that the Court of Appeals' decision is contrary to *Northern Pacific Railway Co. v. United States*, 227 U.S. 355, 33 S.Ct. 368, 57 L.Ed. 544 (1913). The Circuit Court concedes that the *Northern Pacific Railway* case involved conflicting testimony in that several surveys were made. It is pointed out in this case:

> "They reserved, it is true, a much lesser tract, but it was natural and inevitable that the greater boundaries of nature should be selected to define both. These the Indians could understand and estimate."

It is, to us, an untenable construction to place upon

this treaty to say that the means of ingress and egress from the land to the water is cut off by an invisible line imposed by the treaty. The *Northern Pacific* case, *supra*, states in part (the Skokomish canoe used Hood's Canal as a highway):

> "We realize that there is confusion in the calls, irreconcilability, it may be, from some points of view; but our effort must be to ascertain and execute the intention of the treaty makers; and as an element in the effort we have declared that concession must be made to the understanding of the Indians in redress of the differences in the power and intelligence of the contracting parties. *United States v. Winans*, 198 U.S. 371, 49 L.Ed. 1089, 25 Sup. Ct. Rep. 662. The present case invokes in special degree the principle."

and concluding, the court stated in part:

> "The court of appeals expressed the view that the rule that resolves doubts in favor of the patent issued by the United States does not apply in such cases citing *Leavenworth, L. & G. R. Co. v. United States*, 92 U.S. 733, 23 L.Ed. 634; *Stewart v. United States*, 206 U.S. 185, 51 L.Ed. 1017, 27 Sup. Ct. Rep. 631; *Minnesota v. Hitchcock*, 185 U.S. 373, 46 L.Ed. 954, 22 Sup. Ct. Rep. 650. Much can be said in support of that view. It must be borne in mind that the Indians had the primary right. The rights the government has are derived through the cession from the Indians. If the government may control the cession and control the survey, and by the action of the agents foreclose inquiry or determine it, an easy means of rapacity is afforded, much quieter, but as effectual, as fraud. We should hesitate to put the goverment in that attitude. It rejects that attitude and accepts a greater responsibility. It yields to the rule which this court has declared—that it 'will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason

> demand in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise and inequality "by the superior justice which looks only to the substance of the right, without regard to technical rules." *Choctaw Nation v. United States*, 119 U.S. 1, 30 L.Ed. 306, 7 Sup. Ct. Rep. 75; *Jones v. Meehan*, 175 U.S. 1, 44 L.Ed. 49, Sup. Ct. Rep. 1. *United States v. Winans*, *supra*."

The result of this case is, we respectfully submit, to overrule, without specifically saying so, a long line of cases including *Worcester v. Georgia*, 6 Pet. 515; *The Kansas Indians*, 5 Wall. 737; *Choctaw Nation v. United States*, 119 U.S. 1; *Jones v. Meehan*, 175 U.S. 1, 20 S. Ct. 1; *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 93 L.Ed. 1231.

Likewise, there has been a long line of cases which have dealt with this problem of construing Indian treaties in such a way that their purpose of providing the Indians forced upon a reservation with a place where they could be self-sustaining. *United States v. Stotts*, 49 F.(2d) 619 (1930); *Corrigan v. Brown*, 169 Fed. 477 (1907).

In *Moore v. United States*, 157 F.(2d) 760 (1946), the same Circuit Court stated in part:

> "The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation. They had done much for themselves and were striving to do more. Evidently Congress intended to conform its action to their situation and needs * * *."

We believe that the same implications have been carried forth in the following cases before the United States Supreme Court: *Squire v. Capoeman*, 351 U.S. 1, 76 S. Ct. 611, 100 L.Ed. 883 (1956); *United States v. Payne*, 264 U.S. 447, 68 L.Ed. 782 (1924).

The trial court's position is that the Skokomish River itself was where the tribe gained its food and not on the tidelands, and that, therefore, the tidelands could not have been intended as part of the reservation. This seems to be absurd to us on its face; first, because the river itself must flow across the tidelands to reach tide water, and, secondly, because such an interpretation is a relegating of this Indian tribe to specific items of diet rather than making available to it all that was part of their sustenance at the time of the execution of the treaty (29 species of food fish—Appendix E). The interpretation that the trial court and the Circuit Court places upon the treaty is a refinement and a narrowing which can only be the product of the contemporary mind and not a candid acknowledgment of the Indian understanding of 1885. In *United States v. Winans*, 198 U.S. 371, 25 S. Ct. 662 (1905), it was stated:

> "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them—a

reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. ° ° ° It is further contended that the rights conferred upon the Indians are subordinate to the powers acquired by the state upon its admission into the Union. In other words, it is contended that the state acquired by its admission into the Union upon an equal footing with the original states, the power to grant rights in or to dispose of the shore lands upon navigable streams, and such power is subject only to the paramount authority of Congress with regard to public navigation and commerce. The United States, therefore it is contended, could neither grant nor retain rights in the shore or to the lands under water.

"The elements of this contention and the answer to it are expressed in *Shively v. Bowlby*, 152 U.S. 1, 38 L.Ed. 331, 14 Sup. Ct. Rep. 548. It is unnecessary, and it would be difficult, to add anything to the reasoning of that case. The power and rights of the states in and over shore lands were carefully defined, but the power of the United States, while it held the country as a territory, to create rights which would be binding on the states, was also announced, opposing the *dicta* scattered through the cases which seemed to assert a contrary view. ° ° °"

We request the Supreme Court to grant the writ of certiorari. The decision of the District Court and the Circuit Court of Appeals is a long step in judicial undermining of the treaty rights of Indian tribes. If the reservation system is to be eliminated, it should be eliminated

by action in the same level as it was begun and compensation should be made for that which is taken away. The step which has been taken by this decision is a breach of a faith that heretofore has been kept for over a century.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SKOKOMISH INDIAN TRIBE,	*Appellant*,	No. 17,933
v.		July 27, 1963
E. L. FRANCE, TRUSTEE, et al.,	*Appellees*.	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Before JERTBERG and BROWNING, Circuit Judges, and JAMESON, District Judge

JAMESON, District Judge:

Appellant, an Indian tribe incorporated under an Act of Congress,[1] brought this action to establish a claim of title to a strip of tidelands adjoining its reservation on the Hood's Canal and the Skokomish River in Western Washington. Appellant's claim is based upon a treaty between the United States and certain Indian tribes dated January 26, 1855, proclaimed April 29, 1859 (12 Stat. 933), and an executive order dated February 25, 1874. Appellees claim title through various conveyances from the State of Washington. The case was tried before the court without a jury. Pursuant to findings of fact and conclusions of law in favor of appellees, a judgment and

[1]Act of June 18, 1934 (48 Stat. 984) as amended by Act of June 15, 1935 (49 Stat. 378).

decree was entered dismissing plaintiff's complaint with prejudice and quieting title in the respective appellees.

The district court had jurisdiction by virtue of 28 U.S.C. § 1331, as held in *Skokomish Indian Tribe v. France*, 269 F.(2d) 555 (1959). This court has jurisdiction under 28 U.S.C. §§ 1291 and 1294.

The primary issue is whether the tidelands were included within the lands set apart for the use of the Indian tribe under the executive order made pursuant to the treaty. It is conceded that neither the treaty nor the executive order expressly described the tidelands at issue. Article II of the treaty reads in pertinent part:

> "There is, however, reserved for the present use and occupation of the said tribes and bands the following tract of land, viz: The amount of six sections, or three thousand eight hundred and forty acres situated at the head of Hood's Canal, *to be hereafter set apart and, so far as necessary, surveyed and marked out for their exclusive use;* ° ° °" (Emphasis added.)

The executive order of February 25, 1874, reads:

> "It is hereby ordered that there be withdrawn from sale or other disposition and set apart for the use of the S'Klallam Indians the following tract of country on Hood's Canal in Washington Territory, inclusive of the six sections situated at the head of Hood's Canal, reserved by treaty with said Indians January 26, 1855 (Stats. at Large, Vol. 12, p. 934), described and bounded as follows: *Beginning at the mouth of the Skokomish River;* thence up said river to a point intersected by the section line between Sections 15 and 16 of Township 21 North, in Range 4 West; thence north on said line to a corner common to Sections 27, 28, 33 and 34 of Township 22 North, Range 4 West; thence due east to the southwest corner of the southeast quarter of the southeast quarter

> of Section 27, the same being the southwest corner of A. D. Fisher's claim; thence with said claim north to the northwest corner of the northeast quarter of the southeast quarter of said Section 27; thence east to the section line between Sections 26 and 27; thence north on said line to corner common to Sections 22, 23, 26 and 27; *thence east to Hood's Canal; thence southerly and easterly along said Hood's Canal to the place of beginning.*" (Emphasis added.)

Official surveys of the reservation boundaries were made in 1862 and again in 1873, and the balance of the public lands in the vicinity of Hood's Canal in 1873.

There is no evidence that, prior to the commencement of this action in 1948, appellant and its members had asserted title to the tidelands in controversy. The State of Washington began selling the tidelands about 1901. Appellees and their predecessors in title have occupied the lands continuously since their acquisition, have paid taxes thereon, and have made extensive improvements upon portions of the land.

It is the general rule at common law that, where the shore or shore line of a body of navigable water is designated as a boundary, the high water mark is the limit of the boundary line. This rule was established in the early case of *United States v. Pacheco*, 2 Wall. 865, 866, 69 U.S. 587, 590, 17 L.Ed. 865 (1865), where the court said:

> "The position, that by the bay as a boundary, is meant, in this case, the line of low water mark, is equally unfounded. By the common law, the shore of the sea and, of course, the arms of the sea, is the land between ordinary high and low water mark, the land over which the daily tides ebb and flow. When, therefore, the sea or a bay is named as a boundary,

> the line of ordinary high water mark is always intended where the common law prevails."

Appellant contends, however, that the ordinary rule should not be applied in this case; that the treaty and executive order defining the reservation are ambiguous; that the ambiguity must be resolved by construing the language of the instruments as they would naturally be understood by the Indians at the time; that the tidelands were essential to the Indians' livelihood and accordingly the Indians must have understood that they were to have the tidelands; that the surveys which excluded the tidelands from the reservation were ineffectual and must be ignored.

The rule applicable to the construction of treaties with Indian tribes was well summarized in *Choctaw Nation v. United States*, 318 U.S. 423, 431-2, 63 S.Ct. 672, 87 L.Ed. 877 (1943), where the court said:

> "Of course, treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. (Citing cases.) Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.' (Citing cases.) *But even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.*" (Citing cases.)" (Emphasis added.)

See also *Ute Indians v. United States*, 330 U.S. 169, 67

S.Ct. 650, 91 L.Ed. 823 (1947), and *Shoshone Indians v. United States*, 234 U.S. 335, 65 S.Ct. 690, 89 L.Ed. 985 (1945), where the court said at 324 U.S. p. 353:

> "Petitioners suggest that in the construction of Indian treaties we, as a self-respecting nation, hesitate to construe language, which is selected by us as guardian to the Indians, to our ward's prejudice. 'All doubts' say petititoners, 'must be resolved in their (the Indians') favor.' Mr. Justice McLean, concurring in *Worcester v. Georgia*, 6 Pet. 515 at 582, said, 'The language used in treaties with the Indians should never be construed to their prejudice.' But the context shows that the Justice meant no more than that the language should be construed in accordance with the tenor of the treaty. That, we think, is the rule which the court has applied constantly to Indian treaties. We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress."

The pertinent findings of the trial court with respect to the treaty, executive order, surveys, the nature of the tidelands, and the use of the tidelands by the Indian tribe are as follows:

> "2. The treaty (Ex. 3) does not describe the tidelands in issue.
>
> "3. The executive order defines the boundary of the reservation along Hood's Canal as 'thence southerly and easterly along said Hood's Canal to the place of beginning.' The executive order does not describe the tidelands in issue in this case, nor purport to include the same in the description of the reservation. (Ex. 4.)
>
> "4. The exterior boundaries of the Skokomish Reservation referred to in the executive order were surveyed and the easterly and northerly boundary along Hood's Canal was defined and surveyed as the mean-

der line along such waters as established by such official government surveys. (Defendants' Exhibit A-14-1, Document B; Defendants' Exhibit A-9; Plaintiff's Exhibit 5-f).

"5. The original reservation selected by actual occupancy and use by the government officials in charge of the Indians on Hood's Canal did not reach as far north as the common boundary to Sections 35 and 26 in Township 22 North, Range 4 West, but was bounded on the north margin by the south boundary of the A. D. Fisher Donation Claim (Exhibit 7; A-10; Plaintiff's Exhibit 12; Defendants' Exhibit A-14-1). The recommendations of the government officials to the President were to enlarge the then reservation by adding thereto the A. D. Fisher Donation Claim. The Fisher Donation Claim included all the Hood's Canal frontage in said Section 26 and a portion of Section 35 north of the area up to then selected for and used as a reservation. The executive order legal description included the area in the A. D. Fisher Donation Claim.

"6. Other executive orders of the same period, both before and after the executive order here in issue, used varied wording to describe boundaries along navigable waters, and in the case of other executive orders, the boundaries are sometimes defined as extending to 'low water mark.' (Defendants' Exhibit A-1).

"7. The treaty (Exhibit 3) reserves for use and occupancy of the Indians six sections or 3,840 acres 'situated at the head of Hood's Canal, to be *hereafter* set apart, and so far as necessary *surveyed* and *marked* out . . .' There is no evidence of why or when the mouth of the Skokomish River at the bulge of Hood's Canal at Annas Bay was selected rather than the mouth of the Union River at the head of Hood's Canal at the location of the present Town of Belfair. Some early mission settlements for Indian affairs were at the Union River location on the Canal.

"Nothing is reflected in the minutes of the proceed-

ings concerning the treaty or in the history of the event or in any of the evidence to show what location was thereafter to be set aside for Indian use as a reservation other than 3,840 acres 'at the head of Hood's Canal.' No evidence shows any understanding or intention or consideration of whether actual tidelands at the site in litigation or at any other site were to be included in the 3,840 acres. The actual reservation was 4,173.31 acres (Exhibit A-14-1). Such acreage was computed shoreward of the meander line.

"8. Title to submerged land under navigable waters vested in the State of Washington upon its admission into the Union and was held by the United States previously thereto in trust of the State to be formed (except only for such disclaimers as appear in the State Constitution adopted conformable to the Enabling Act of the Congress).

"9. The reservation abutting on Hood's Canal was surveyed and divided into Indian lots and pursuant to due proceedings in that behalf the same were allotted to various individual Indians who in turn by due proceedings approved by the necessary government authorities sold such Indian lots and conveyed title thereto to defendants' predecessors in title. (Admitted Fact VI; Pretrial Order, page 19, et seq.)

"10. The entire frontage of the Skokomish Reservation along Hood's Canal was thus disposed of by allottees and no portion of such frontage remains in the reservation. (Hanson Map, Exhibit A-59; Admitted Fact VI; Exhibits A-21, A-63, A-64, A-25 to A-35 and A-2.)

* * *

"14. At the time of the treaty and at the time of the executive order, the Indians for whose benefit the same were made were dependent for their livelihood in part upon fish. The major and primary fish so used was salmon. The only foods referred to as of concern to the Indians in the minutes of the treaty negotiations were 'berries, deer and salmon.'

"15. The salmon were easily procured in the rivers and creeks, particularly in the Skokomish River, and were ordinarily caught there with traps. The Indians had their basic villages up the rivers in sheltered wooded areas, close to the rivers and creeks where salmon abounded and other game was readily procurable. Migration by the Indians was primarily governed by salmon runs in various seasons of the year according to species running in other parts of Hood's Canal and in other rivers and creeks tributary thereto.

"16. The Skokomish villages were primarily at the juncture of the north fork of the Skokomish River and the south fork of the Skokomish River and on Vance Creek west of that fork, which is up the Skokomish River westerly of the reservation and many miles from the tidelands in issue. (Exhibit A-62, pages 6-143 and 6-144; Elmendorf Exhibit 60, pages 32 to 37, Geographic Sites 1 to 32 and map opposite page 48.)

"17. No salmon creek or river entered Hood Canal across the tidelands in issue except the Skokomish River. (Exhibit 60, pages 38-39; Exhibit 36; Exhibit 5; Exhibit 41.)

"18. Shell fish were used by the Indians at the time of the treaty and executive order but to a limited extent, and more as a delicacy, and the livelihood of the Indians was not dependent in material degree upon shellfish or any type of fishing on or from the tidelands in issue.

"19. The usual locations at which shellfish were procured were miles from the reservation and were reached by canoe travel on Hood's Canal. * * *

"20. The tidelands in issue, particularly in Section 26, are not and were not a source of native shellfish in usable quantities.

"21. The tideland strip in Section 26 is narrow, rocky and gravelly. Exploration for shellfish within such strip is onerous and unrewarding.

"22. The salinity of the waters of Annas Bay on

Hood's Canal on which the reservation abuts is below that permitting shellfish to thrive and below that at which some species can survive. The entire Annas Bay salinity is affected by the discharge of the Skokomish River into the bay, which is the largest fresh water inlet into Hood's Canal, and with each turn of the tide the fresh waters of the river wash the tidelands in issue. (Dr. Stein Testimony, Exhibit A-49 to A-58; Testimony of Alice Hanson and Wallace Hanson.)

"34. The land and legal descriptions of land contained and mentioned in the treaty and the executive order and in the surveyor's notes and surveys and in bureau and departmental correspondence and records did not contain, mention or include tidelands or tidal waters, and nothing therein grants, gives or conveys or reflects an intention to grant, give or convey to plaintiff or to any predecessor of plaintiff any right, title or interest in or to any land not therein described, nor to any tidelands or submerged lands or properties claimed herein by defendants."

These findings fully sustain the district court's conclusion that "the tidelands involved in this action are not a part of the Skokomish Indian Reservation" and that the "State of Washington acquired title to the tidelands * * * upon the admission of that state into he Union." Unless clearly erroneous the findings must be accepted by this court. Rule 52, F.R.C.P. "It is not the function of this court to retry cases on appeal." *Glens Falls Indemnity Company v. United States*, 9 Cir. 1955, 229 F.(2d) 370, 373. After reviewing the record in its entirety, it is our conclusion that the findings are not clearly erroneous, but, on the contrary, are amply supported by the evidence.

The use of the tidelands by the Indian tribe, as disclosed

by the evidence, does not support appellant's contention that the tidelands were essential to the Indians' livelihood and that the Indians accordingly must have understood they were to have the tidelands. The minutes of the treaty negotiations[2] contain no reference to tideland ownership, nor to the use of shellfish as food. Initially many members of the tribe objected to the proposed treaty. They were concerned with possible loss of their sources of food—"berries, deer and salmon." The first to speak said in part:

> "I wish to speak my mind as to selling the land, Great Chief! What shall we eat if we do so? Our only food is berries, deer and salmon—where then shall we find these? I don't want to sign away all my land, take half of it, and let us keep the rest. I am afraid that I shall become destitute and perish for want of food." (Ex. 10.)

After the Indians had been assured that the reservation would only be a place at which they must make their homes, the Indians discussed the proposal among themselves and on the following day assented to the treaty. At that time one of the tribe said:

> "My heart is good. I am happy since I have heard the paper read and since I have understood Gov. Stevens, particularly since I have been told that I could look for food where I pleased and not in one place only. * * * We are willing to go up the Canal since we know we can fish elsewhere. We shall only

[2]In the treaty negotiations conducted at Point No Point, Governor Isaac Stevens represented the United States. At a meeting on January 25, 1855, the treaty was read and interpreted to the Indians, followed by statements of various Indians and explanations of the terms of the treaty by Governor Stevens and his assistants. The treaty was signed on January 26.

leave there to get salmon, and when done fishing will return to our houses." (Ex. A-8.)

It is clear that the reservation was intended only as a residence and the Indians were to remain free to roam and fish at their usual places.[3] From the testimony of the Indian witnesses and the many historical documents and works in evidence, it is apparent that the Skokomish Indians roamed extensively over the Hood's Canal, following seasonal fishing. Their primary sources of food were the different species of salmon which abounded in the streams entering the canal. They were both an inland and salt water people. One group, the Vance Creek settlement, lived almost entirely an inland-riverine existence, while the lives of the others centered upon river settlements in winter and upon Hood's Canal in the summer.

It is true that shellfish and other forms of sea life were gathered by the Skokomish along the canal. While there is some conflict in the testimony of the Indian witnesses, the evidence clearly preponderates in favor of the trial court's findings "That the usual locations at which shellfish were procured were miles from the reservation and were reached by canoe travel on Hood's Canal"; and "That the tidelands in issue, particularly in Section 26, are not and were not a source of native shellfish in usable quanities."

Appellant relies heavily upon Exhibit 60, excerpted from research studies of Dr. W. W. Elmendorf, a well-qualified expert in the field of ethnology or cultural anthropology.

[3]The right to fish was granted by Article IV of the treaty, viz., "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimd lands."

who did considerable discriminating research among the Skokomish Indians. But Dr. Elmendorf's studies, when closely examined, support the findings of the trial judge. According to Dr. Elmendorf, the Skokomish were part of a group of Indians living along the shores of Hood's Canal, which he termed 'Twana' Indians. He says in pertinent part:

> "The most important source of food for all Twana was Pacific salmon, four species of which were common in the canal and ran in its tributary streams. * * * The bulk of the salmon catch was made in rivers, with weirs, dip nets and harpoons, during late summer and fall runs. Salt water trolling and netting was of minor importance, in particular to the Skokomish with their large river runs of salmon.
>
> * * *
>
> "River fishing for all these fish (king, silver, humpback, dog and steelhead) was primary, with weirs and associated dip-net structures the most productive method. Salmon, as well as other types of fish, were also trolled for with hook and line from canoes in salt water, but this method furnished a relatively small proportion of the catch." Ex. 60, pp. 57 and 60.
>
> * * *
>
> "Women gathered molluscs during the warmer months of the year, using for clam digging the same digging stick employed for roots and open work baskets carried by a tumpline. Some species, particularly clams, were obtained in large quantities and furnished an important part of the Twana diet.
>
> * * *
>
> "Clam digging started in May in the region at the head of Hood's Canal (duxwle' lap)[4] and continued

[4]The reference is to the geographic site located and described in an earlier portion of the work (Ex. 60). Dr. Elmendorf set forth at pp. 32-55 of the exhibit a list of geographic sites identified by their Indian names which were important in the life of these Indians before they were placed on the reservation. He indicated the location of these sites by number on a map, which appears opposite page 48 of the exhibit. Duxwle 'lap is site No. 128 and is identified as "'place at the farthest-in tail end (of the water)' * * * An extended-area term for all the territory at the head of Hood's Canal; in specific reference, the actual end of the inlet, the mouth of the Union River." (See Ex. A-62.)

> through the summer. As the season grew later the best clam beds were found farther down the canal, the latest intensive clam digging was in August on beaches in the area termed slca'wks,[5] on the east shore of the lower (northern) canal. Here work parties from various Twana village communities foregathered in the late summer." Ex. 60, p. 123.

Both of these sites are several miles from the reservation.

We agree with the following summary of the trial judge in his unpublished memorandum opinion:

> "Allowing in full measure for the inequalities of understanding and position of the parties negotiating the treaty and giving full effect to the rules of treaty construction favoring the primitive Indians, on the entire record in the present case, this court is fully satisfied that not any one of the parties negotiating the treaty of 1855 had the slightest thought or intention that the treaty or the executive order to follow would vest ownership to the tidelands in question in the Skokomish or in any other Indian tribe. On the contrary, the record of negotiations, the language and substance of the treaty, the specific terms of the executive order, and all pertinent circumstances shown by the evidence negative understanding or intent to such effect by any of the parties negotiating the treaty or concerned with or by the order. Considering the absence of support for any such contention, the long delay in any mention or assertion thereof is not surprising."

The cases upon which appellant relies are distinguishable. In *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 39 S. Ct. 40, 63 L.Ed. 138 (1918), Congress had set

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[5]Slca'wks refers to site No. 176, "The east shore of Hood's Canal from Bangor (King Spit) north of Port Gamble." (See Ex. A-62.)

apart "a body of lands known as the Annette Islands." It was held that the reservation included the adjacent fishing waters and submerged land, the court finding that the adjacent fishing grounds were essential to the subsistence and economic development of the tribe and accordingly Congress must have intended to include them. In *United States v. Moore*, W. D. Wash. 1945, 62 F. Supp. 660, aff'd 157 F. (2d) 760, the United States, by treaty, agreed with the Indians to reserve "a tract or tracts of land sufficient for their wants." The executive order setting apart the tract was silent as to any rights in the bordering waters. The court held that the treaty and executive order should be construed to include the lands under the adjoining waters, because the record established that they were fish-eating Indians dependent for their sole means of support upon the continued use of those waters, from which they caught their fish.

The distinction between those cases and the instant case is one of fact and readily apparent. Here the trier of facts has found, upon substantial evidence, that the tidelands were not essential to the livelihood of the Indians at the time of the treaty and the executive order providing for the reservation. It is clear from the record that the reservation was not intended to support these Indians, as was the case in *Alaska Pacific Fisheries v. United States*, or to be "sufficient for their wants," as was the expressed intention of the treaty in *United States v. Moore*.

Nor is this a case such as *Northern Pacific Railway Company v. United States*, 227 U.S. 355, 33 S. Ct. 368, 57

L.Ed. 544 (1913),[6] or *United States v. Romaine*, 255 Fed. 253, 9 Cir. (1919),[7] where surveys were found to be inconsistent with the understanding of the parties to the treaties and where the applicable documents contained language supporting the boundary claims of the Indians. The documents and historical background material in this case do not manifest an intention of the treaty makers to include the tidelands in the Skokomish Reservation. Accordingly, title to the tidelands vested in the State of Washington upon its admission to the Union and passed subsequently to the appellees. See *United States v. Holt State Bank*, 270 U.S. 49, 46 S. Ct. 197, 70 L.Ed. 465 (1926).

As the trial judge pointed out in his memorandum opinion, a claim is pending with the Indian Claims Commission whereby the Skokomish Tribe seeks an award for alleged inadequate compensation for the lands ceded under the 1855 treaty. If, in fact, the treaty and executive order did not make adequate provision for the tribe, com-

[6] In *Northern Pacific Railway Company v. United States*, the Supreme Court affirmed a construction of a treaty between the United States and the Yakima Indians, establishing the western boundary of the Yakima Reservation at the *main* ridge of the Cascade Mountains, rather than at a lesser ridge which would reduce the size of the reservation. While the treaty was susceptible to other construction, it contained the following language in the boundary description, "thence along the southern tributary to the Cascade Mountains; thence southerly along the *main* ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco rivers, * * *" 227 U.S. at 357. (Emphasis added.)

[7] In *United States v. Romaine*, this court said in pertinent part: "The intention to reserve to the Indians the possession of the land to low-water mark is made evident by the terms of the proclamation; for one of the courses on the west side of the island runs 'to the low-water mark on the shore of the Gulf of Georgia, then southerly and easterly along the said shore with the meanders thereof, across the western mouth of the Lummi River, and around Point Francis.'" 255 Fed. at 259.

pensation can and presumably will be awarded by the Commission.[8]

Our conclusion on the primary issue fully disposes of the case and renders it unnecessary to extend this opinion further by discussion of the other issues raised and argued by the parties.

Judgment affirmed.

(Endorsed) Opinion filed July 27, 1963.

FRANK H. SCHMID, *Clerk*

[8]As the trial court well said: "The defendants in the instant case purchased and substantially improved their properties in complete good faith and without the slightest knowledge, actual or constructive, of the title claim now so belatedly asserted. Whatever public atonement for early day wrongs may be due the Skokomish Indians, granting the relief sought in the present case is not justified by the evidence presented or by the law applicable thereto."

APPENDIX B

TREATY WITH THE S'KLALLAMS

January 26, 1855

Treaty between the United State of America and the S'Klallams Indians. Concluded at Point No Point, Washington Territory, January 26, 1855; Ratified by the Senate, March 8, 1859; Proclaimed by the President of the United States, April 29, 1859.

JAMES BUCHANAN

PRESIDENT OF THE UNITED STATES OF AMERICA

January 26, 1855

To All and Singular to Whom These Presents Shall Come, Greeting:

WHEREAS a Treaty was made and concluded at Hahd Skus, or Point No Point, in Washington Territory, on the 26th day of January, 1855, between Isaac I. Stevens, Governor and Superintendent of Indian Affairs for the said Territory, on the part of the United States, and the hereinafter named Chiefs, Headmen, and Delegates, of the different villages of the S'Klallams Indians, viz.: the Kahtai, Squah-quaihtl, Tch-queen, Ste-tehtlum, Tsolikw, Yennis, El-hwa, Pishtst, Hunnint, Klat-la-wash, and Oke-no, and also of the Sko-ko-mish, Too-an-hooch, and Chem-a-kum tribes occupying certain lands on the Straits of Fuca and Hood's Canal, in the Territory of Washington, on behalf of said tribes, and duly authorized by them; which treaty is in the words and figures following, to wit: Preambl

Articles of agreement and convention, made and concluded at Hahd-skus, or Point No Point, Suquamish Head, in the Territory of Washington, this 26th day of Contract Parties

January, 1855, by Isaac L. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen and delegates of the different villages of the S'Klallams, viz.: Kah-tai, Squah-quaihtl, Tch-queen, Stetehtlum, Tsohkw, Yennis, Elhwa, Pishtst, Hun-nint, Klatla-wash, and Oke-ho, and also of the Sko-ko-mish, To-an-hooch and Chem-a-kum tribes, occupying certain lands on the Straits of Fuca and Hood's Canal in the Territory of Washington, on behalf of said tribes, and duly authorized by them.

Cession of lands to the United States.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, viz.: commencing at the mouth of the Okeho River, on the Straits of Fuca, thence southeastwardly along the westerly line of territory claimed by the Makah tribe of Indians to the summit of the Cascade range; thence still southeastwardly and southerly along said summit to the head of the west branch of the Satsop River, down that branch to the main fork; thence eastwardly and following the line of lands heretofore ceded to the United States by the Nisqually and other tribes and bands of Indians, to the summit of the Black Hills, and northeastwardly to the portage known as Wilkes' portage; thence northeastwardly, and following the line of lands heretofore ceded to the United States by the Dwamish, Suquamish, and other tribes and bands of Indians to Suquamish Head; thence northerly through Admiralty Inlet to the Straights of Fuca; thence westwardly through said straits to the place of beginning;

Boundaries.

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ante Treaties, p. 1.

including all the right, title, and interest of the said tribes and bands to any land in the Territory of Washington.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands the following tract of land, viz.: the amount of six sections, or three thousand eight hundred and forty acres, situated at the head of Hood's Canal, to be hereafter set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes and bands, and of the superintendent or agent; but, if necessary for the public convenience, roads may be run through the said reservation, the Indians being compensated for any damage thereby done them. It is, however, understood that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band, to occupy the same in common with those above mentioned, he shall be at liberty to do so. Reservation

Whites not to reside thereon

ARTICLE III. The said tribes and bands agree to remove to and settle upon the said reservation within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any lands not in the actual claim or occupancy of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner. Tribes to settle on reservation

ARTICLE IV. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering Privileges to the Indians

roots and berries on open and unclaimed lands. *Provided, however*, That they shall not take shell-fish from any beds staked or cultivated by citizens.

Payments by the United States.

ARTICLE V. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of sixty thousand dollars, in the following manner, that is to say: during the first year after the ratification hereof, six thousand dollars; for the next two years, five thousand dollars each year; for the next three years, four thousand dollars each year; for the next four years, three thousand dollars each year; for the next five years, two thousand four hundred dollars each year; and for the next five years, one thousand six hundred dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

How to be Applied.

Appropriation for removal, &c.

ARTICLE VI. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of six thousand dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

Indians may be removed to other reservation.

ARTICLE VII. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted, remove them from said reservation to such other suitable place or places with-

in said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate thereon as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made therefor accordingly.

Lands ma... surveyed a... assigned &...

Vol. x. p. ...

ARTICLE VIII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

Annuities ... to be taken ... debts of individuals

ARTICLE IX. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe, except in self defence; but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depre-

Tribes to p... serve friend... relations.

to pay for depredation...

not to mak... war but m... defence.

dations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the United States, but to deliver them up for trial by the authorities

To surrender offenders

Annuities may be withheld from those drinking ardent spirits.

ARTICLE X. The above tribes and bands are desirous to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging thereto who shall be guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

United States to establish school

ARTICLE XI. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for the period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide a smithy and carpenter's shop, and furnish them with the necessary tools; and employ a blacksmith, carpenter, and farmer for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of the said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

Mechanics' shop

To employ a physician

Tribes to free slaves and not to acquire others

ARTICLE XII. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE XIII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservation without consent of the superintendent or agent. Not to trade out of the United States.

ARTICLE XIV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States. When treaty to take effect.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians have hereunto set their hands and seals at the place and on the day and year hereinbefore written. Signatures. January 26, 1

ISAAC I. STEVENS, *Governor and Superintendent*. [L. S.]

CHITS-A-MAH-HAN, the Duke of York, *Chief of the S'klallams*. his x mark. [L. S.]

DAH-WHIL-LUK, *Chief of the Sko-ko-mish*. his x mark. [L. S.]

KUL-KAH-HAN, or General Pierce, *Chief of the Chem-a-kum*. his x mark. [L. S.]

HOOL-HOLE-TAN, or Jim, *Sko-ko-mish sub-chief*. his x mark. [L. S.]

SAI-A-KADE, or Frank, *Sko-ko-mish sub-chief*. his x mark. [L. S.]

LOO-GWEH-OOS, or George, *Sko-ko-mish sub-chief*. his x mark. [L. S.]

E-DACH-TAN, or Tom, *Sko-ko-mish sub-chief*. his x mark. [L. S.]

KAI-A-HAN, or Daniel Webster, *Chem-a-kum sub-chief*. his x mark. [L. S.]

ETS-SAH-QUAT, *Chem-a-kum sub-chief*. his x mark. [L. S.]

KLEH-A-KUNST, *Chem-a-kum sub-chief*. his x mark. [L. S.]

HE-ATL, Duke of Clarence, S'*klallam sub-chief*. his x mark. [L. S.]

LACH-KA-NAM, or Lord Nelson, S'*klallam sub-chief*. his x mark. [L. S.]

TCHOTEST, S'*klallam sub-chief*. his x mark. [L. S.]

HOOT-OTE ST, or General Lane, S'*klallam sub-chief*. his x mark. [L. S.]

TO-TOTESH, S'*klallam sub-chief*. his x mark. [L. S.]

HAH-KWIA-MIHL, S'*klallam sub-chief*. his x mark. [L. S.]

SKAI-SE-EE, or Mr. Newman, S'*klallam sub-chief*. his x mark. [L. S.]

KAHS-SAHS-A-MATL, S'*klallam sub-chief*. his x mark. [L. S.]

S'HOTE-CH-STAN, S'*klallam sub-chief*. his x mark. [L. S.]

LAH-ST, or Tom, S'*klallam sub-chief*. his x mark. [L. S.]

TULS-MET-TUM, Lord Jim, S'*klallam sub-chief*. his x mark. [L. S.]

YAHT-LE-MIN, or General Taylor, S'*klallam sub-chief*. his x mark. [L. S.]

KLA-KOISHT, or Captain, S'*klallam sub-chief*. his x mark. [L. S.]

SNA-TALC, or General Scott, S'*klallam sub-chief*. his x mark. [L. S.]

TSEH-A-TAKE, or Tom Benton, S'*klallam sub-chief*. his x mark. [L. S.]

YAH-KWI-E-NOOK, or General Gaines, S'*klallam sub-chief*. his x mark. [L. S.]

KAI-AT-LAH, or General Lane, Jr., S'*klallam sub-chief*. his x mark. [L. S.]

CAPTAIN JACK, S'*klallam sub-chief*. his x mark. [L. S.]

HE-ACH-KATE, S'*klallam sub-chief*. his x mark. [L. S.]

T'SOH-AS-HAU, or General Harrison, S'*klallam sub-chief*. his x mark. [L. S.]

KWAH-NALT-SOTE, S'*klallam sub-chief*. his x mark. [L. S.]

S'HOKE-TAN, S'*klallam sub-chief*. his x mark. [L. S.]

PAITL, S'*klallam sub chief*. his x mark. [L. S.]

WEN-A-HAP, *S'klallam sub-chief.*	his x mark.	[L. S.]
KLEW-SUM-AH, *S'klallam sub-chief.*	his x mark.	[L. S.]
SE-ATT-HOME-TAU, *S'klallam sub-chief.*	his x mark.	[L. S.]
TSAT-SAT-HOOT, *S'klallam tribe.*	his x mark.	[L. S.]
PE-AN-HO, *S'klallam tribe.*	his x mark.	[L. S.]
YI-AH-HUM, *or John Adams, S'klallam tribe.*	his x mark.	[L. S.]
TI-ITCH-STAN, *S'klallam tribe.*	his x mark.	[L. S.]
SOO-YAHNTCH, *S'klallam tribe.*	his x mark.	[L. S.]
TTSEH-A-TAKE, *S'klallam tribe.*	his x mark.	[L. S.]
HE-ATS-AT-SOOT, *S'klallam tribe.*	his x mark.	[L. S.]
TOW-OOTS-HOOT, *S'klallam tribe.*	his x mark.	[L. S.]
TSHEH-HAM, *or General Pierce, S'klallam tribe.*	his x mark.	[L. S.]
KWIN-NAS-SUM, or George, *S'klallam tribe.*	his x mark.	[L. S.]
HAI-AHTS, John, *S'klallam tribe.*	his x mark.	[L. S.]
HAI-OTEST, John, *S'klallam tribe.*	his x mark.	[L. S.]
SEH-WIN-NUM, *S'klallam tribe.*	his x mark.	[L. S.]
YAI-TST, or George, *S'klallam tribe.*	his x mark.	[L. S.]
HE-PAIT, or John, *S'klallam tribe.*	his x mark.	[L. S.]
SLIMM, or John, *S'klallam tribe.*	his x mark.	[L. S.]
T'KLALT-SOOT, or Jack, *S'klallam tribe*	his x mark.	[L. S.]
S'TAI-TAN, or Sam, *S'klallam tribe.*	his x mark.	[L. S.]
HUT-TETS-OOT, *S'klallam tribe.*	his x mark.	[L. S.]
HOW-A-OWL, *S'klallam tribe.*	his x mark.	[L. S.]

Executed in the presence of us —

M. T. SIMMONS.

C. H. MASON, *Secretary Washington Territory.*

BENJ. F. SHAW, *Interpreter.*

JOHN H. SCRANTON.

JOSIAH P. KELLER.

C. M. HITCHCOCK, M.D.,
A. B. GOVE,
H. A. GOLDSBOROUGH,
B. J. MADISON,
F. A. ROWE,
JAS. M. HUNT,
GEORGE GIBBS, *Secretary*,
JOHN J. REILLY,
ROBT. DAVIS,
S. S. FORD, JR.,
H. D. COCK,
ORRINGTON CUSHMAN,
J. CONKLIN.

Ratification, March 8, 1859.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION,

"SENATE OF THE UNITED STATES, March 8, 1859.

"*Resolved*, (two thirds of the senators present concurring), That the Senate advise and consent to the ratification of treaty between the United States and the S'klallams Indians occupying lands in the Straits of Fuca and Hood's Island, in Washington Territory, signed 26th January, 1855.

"Attest: "ASBURY DICKINS, *Secretary*."

Proclamation, April 29, 1859.

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursu-

ance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, eighteen hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this twenty-ninth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

[SEAL] JAMES BUCHANAN.

By the President:

LEWIS CASS, *Secretary of State.*

APPENDIX C

SKOKOMISH RESERVE

(In Puyallup Agency, area, one-half square mile, occupied by Clallam, Twana and Skokomish, treaty January 26, 1855.)

EXECUTIVE MANSION, *February 25, 1874.*

It is hereby ordered that there be withdrawn from sale or other disposition and set apart for the use of the S'Klallam Indians the following tract of country on Hood's Canal in Washington Territory, inclusive of the six sections situated at the head of Hood's Canal, reserved by treaty with said Indians January 26, 1855 (Stats. at Large, vol. 12, p. 934), described and bounded as follows: Beginning at the mouth of the Skokomish River; thence up said river to a point intersected by the section line between sections 15 and 16 of township 21 north, in range 4 west; thence north on said line to a corner common to sections 27, 28, 33, and 34 of township 22 north, range 4 west; thence due east to the southwest corner of the southeast quarter of the southeast quarter of section 27, the same being the southwest corner of A. D. Fisher's claim; thence with said claim north to the northwest corner of the northeast quarter of the southeast quarter of said section 27; thence east to the section line between sections 26 and 27; thence north on said line to corner common to sections 22, 23, 26, and 27; thence east to Hood's Canal; thence southerly and easterly along said Hood's Canal to the place of beginning.

U. S. GRANT.

APPENDIX D

TABLE OF EXECUTIVE ORDER RESERVATIONS AND THEIR INTERPRETATION

The following table is an actual list of eight (8) reservations created in the State of Washington pursuant to treaties with the United States by Executive Orders of the President of the United States. In some of these Executive Orders the term *"too low water mark"* was included and in others subsequently litigation has included this phrase as being inadvertently left out of the Executive Orders by the respestive presidents.

In the Skokomish Treaty, which was signed in 1855 as set out in Appendix "B" herein, President U. S. Grant signed an Executive Order on February 25, 1874 (Appen-

Reservation by Exec. Order	*On Tidal Waters*	*Description Includes "Low Water Mark"*	*Court Decrees*	*Citation*
LUMMI	Yes	Yes	"EXTREME LOW WATER"	*U.S. v. Stotts*, 49 F.(2d) 619
MAKAH	Yes	Yes	No litigation	
PUYALLUP	Yes	Yes	Corrected by Exec. Order to include tidelands	Page 202, 203, 204 Exec. Orders
QUILEUTE	Yes	No	Corrected to include tidelands	*U.S. v. Moore*, 157 F.(2d) 760
QUINAIELT	Yes	Yes	No litigation	
SKOKOMISH	Yes	No	This litigation	
SWINOMISH	Yes	Yes	"TO EXTREME LOW WATER"	*State v. Edwards*, 188 Wash. 467
TULALIP	Yes	Yes	No litigation	

dix "C") some 19 years after the treaty was made with the Skokomish Tribe of Indians. The petitioner contends that leaving out the term "low water" was an inadvertent error on the part of a clerk in Washington in view of the construction of the balance of the Executive Orders creating Indian Reservations on tidal basin areas in Western Washington.

In the case of eight executive order reservations the term *"low water mark"* has been used in six of the descriptions and in three of these Reservations, the Lummi, Quileute, and Swinomish, the Courts have interpreted the description to include the tidelands to "extreme low water" so it is obvious that the terms "to low water mark" were left out of the description of the Skokomish Reservation by inadvertence. That low water mark was intended by the parties is beyond a question, since these tidelands contain some of the finest native shellfish in the world.

APPENDIX E

SMITHSONIAN REPORT FOR 1886-1887 REV. MYRON EELLS, MISSIONARY 1875 TO 1887 ON SKOKOMISH RESERVATION

THE TWANA, CHEMAKUM, AND KLALLAM INDIANS, OF WASHINGTON TERRITORY

By Rev. Myron Eells

ANTHROPOLOGICAL PAPERS

(U. S. District Court, Tacoma—No. 1183. Plaintiff's Exhibit No. 57)

Excerpts on Fishing

FISH AND OTHER MARINE ANIMALS

Five kinds of these are used as follows:

Abalone—The shells for money and ornaments.

Clam—Three kinds of clam are used for food, and the large shells are used as drinking dishes.

Codfish—The flesh and eggs of two kinds are used for food.

Crab—Two varieties are used for food.

Dogfish—Oil obtained from it; occasionally the flesh is eaten; the bones are used for ornaments, and a part of the skin is a substitute for sand-paper.

Dentalia—The shells for money and ornaments.

Flounder—Two varieties are used for food.

Halibut, Herring and Mussels—Also used as food.

Olivella—The shells used for ornaments and sometimes money.

Oyster—Food.

Porpoise—Food and oil.

Salmon, five varieties, viz., silver, dog, red, black and humpbacked—Both the eggs and flesh are used for food, and eggs for bait.

Seal (fur)—Is highly esteemed.

Seal (hair)—Buoys used in whaling, small sacks, pouches, etc., are made from the skin, oil is made from the blubber, and the flesh is eaten.

Shark—From this oil is obtained.

Smelt and Sea-egga—Used as food.

Scallop—The shells are used for rattles in tamanousing, and the flesh for food.

Skate and Trout—Food.

Whale—Furnishes food and oil, bones for war clubs, sinew for thread, and whale bone for a part of the cod-fish hook.

Cuttlefish—Food.

CULTURE

(29 Species of Fish.)

(From Tidal Waters)

Means of subsistence—Food formerly consisted solely of fish, roots, berries, and game, the spontaneous products of land and water.

The fish and marine mammals formerly used are still eaten, and are of at least nineteen kinds, namely, two vari-

eties of codfish, two of flounders, five of salmon, the silver, dog, red, black, and humpbacked, and one each of dogfish, smelt, skates, hair-seal, trout, whale, halibut, herring, porpoise, and cuttlefish. The dogfish is used only occasionally when other food is scarce. The salmon, halibut herring, and smelt are dried as well as eaten fresh, the salmon being split open and the backbone being taken out. The halibut is cut into strips, and the herring and smelt are dried whole. Salmon are now also sometimes salted. Besides the flesh of the dogfish, porpoise, seal, and whale the oil was formerly eaten. The eggs of the codfish and salmon are a luxury. The porpoise, from its resemblance to pork, is called Indian pork.

Ten kinds of shellfish are used for food, four of them being different varieties of clams, two of crabs, and one each of oysters, mussels, sea eggs, and scallops, the latter two being found only in the Klallam waters. Clams alone are dried. In drying them the Indians first built a large fire in which they heat a number of stones, and when the fire has nearly burned down, they remove the coals, pour on the clams, perhaps bushels of them, and cover the whole with several thicknesses of mats. They are thus steamed until they are cooked and opened, when they are taken from the shell, spitted on slender sticks 2 or 3 feet long, and put over fires in their houses to dry.

Fish eggs are dried by being placed on small wooden frames, a foot or two square, and placed over the fire. Salmon was formerly their staff of life, and their chief business in the summer was to dry it for winter. There are some kinds of fish in their waters all the year round, though some varieties they do not eat unless food is scarce.